

SAMUEL CHARLES VAN NESS §  
v. § CIVIL ACTION NO. 9:11cv182  
DIRECTOR, TDCJ-CID §

The Petitioner Samuel Van Ness, proceeding *pro se*, filed this application for the writ of habeas corpus challenging the legality of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Van Ness was convicted of misdemeanor driving while intoxicated, receiving a sentence of 180 days in the Polk County Jail, probated for two years. He is currently on community supervision. Van Ness complains in his petition that he received ineffective assistance from his attorney, Cecil Berg.

The Respondent was ordered to answer the petition and has done so. This answer asserts that Van Ness has not exhausted his state remedies because he did not seek discretionary review or file a state habeas corpus application, and thus has not presented his claims to the highest court for the State of Texas. Nonetheless, the Respondent contends that the petition should be dismissed on the merits. Van Ness did not file a response to the answer,

After review of the pleadings, the Magistrate Judge issued a Report on May 14, 2012, recommending that the petition be dismissed with prejudice as lacking in merit, in that Van Ness

failed to show that he had received ineffective assistance of counsel. The Magistrate Judge noted that while Van Ness had in fact failed to exhaust his administrative remedies, 28 U.S.C. §2254(b)(2) permits the district court to dismiss an application for the writ of habeas corpus on the merits notwithstanding a failure by the applicant to exhaust his state remedies. Finally, the Magistrate Judge recommended that Van Ness be denied a certificate of appealability *sua sponte*.

A copy of the Magistrate Judge's Report was sent to Van Ness at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 12) is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is hereby DISMISSED with prejudice. It is further

ORDERED that the Petitioner Samuel Van Ness is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all other motions which may be pending in this civil action are hereby DENIED.

So **ORDERED** and **SIGNED** this **15** day of **June, 2012**.



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Ron Clark, United States District Judge